



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**ELECTION PETITION NO. 5 OF 2013**

**IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011 LAWS OF KENYA**

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)**  
**PETITION RULES, 2013**

AND

**IN THE MATTER OF THE ELECTION FOR MEMBER FO THE NATIONAL ASSEMBLY OF**  
**NYARIBARI CHACHE CONSTITUENCY CODE NO. 267**

BETWEEN

RICHARD NYAGAKA TONG'I ..... PETITIONER

**-VERSUS-**

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT

ROBERT K. NG'ENY RETURNING OFFICER,

NYARIBARI CHACHE CONSTITUENCY ..... 2<sup>ND</sup> RESPONDENT

CHRIS MUNGAI NYAMARATANDI BICHAGE ..... 3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. Upon the results of the 4<sup>th</sup> March 2013 General Election in Nyaribari Chache Constituency, the 3<sup>rd</sup> Respondent was announced winner after the 1<sup>st</sup> Respondent's official (the 2<sup>nd</sup> Respondent) declared that the 3<sup>rd</sup> respondent had garnered the highest number of votes.
2. The petitioner who was the runner-up in the election filed a petition dated 8th April 2013, in which he alleged that on accurate count of the votes in the primary documents in Form 35 which recorded the votes as tallied at the polling stations showed him as a clear winner over the 3<sup>rd</sup> respondent contrary to the position shown on the constituency tally Form 36.
3. The petitioner's case was primarily set out at paragraphs 12 – 17 of the Petition as follows: -

***“12. Upon conclusion of the voting, and vote counting processes in the polling***

*station of the constituency on 4<sup>th</sup> March, 2013 all the Presiding Officers of the respective polling stations delivered up the declaration of results in Form 35 from their respective Polling station to the 2<sup>nd</sup> Respondent At Keumbu Social Hall which was the tallying centre for purposes of tallying, but the 2<sup>nd</sup> Respondent ignored and/or did not use the forms in his tallying processes*

*13. The tallying exercise relating to the election of member of the National Assembly began at 9.00p.m. on 4<sup>th</sup> March, 2013 and was concluded at about 8.00pm on 5<sup>th</sup> March, 2013. In this tallying exercise, the winner was the Petitioner RICHARD NYAGAKA TONGI with 10,717 votes as per form 35 which is the primary source of data.*

*14. The 2<sup>nd</sup> Respondent was required by Regulation 83 of the Elections (General) Regulations 2012, to declare the winner of the election who was clearly, the petitioner. However, the 2<sup>nd</sup> Respondent declined to declare the results thereof which he disguised by stating that he would announce the results for all seats in the General Election together upon conclusion of tallying of votes in each, and every, one of them.*

*15. A proper reading of the Elections Act and the Elections Regulations does not reveal that the results of the election of Member of the National Assembly should await other results before it is declared or does the 2<sup>nd</sup> Respondent as the returning officer in the election empowered to withhold the results, in an event that the difference between the votes garnered by the first two candidates is small or narrow.*

*16. The 2<sup>nd</sup> Respondent embarked on the tallying exercise together with the 1<sup>st</sup> Respondent's tallying clerks without involving the Petitioner and/or his agents which was against the law.*

*17. Consequently, it is clear from form 35 from every Polling Station as the primary source of data for the tallying processes that the Petitioner herein was the winner and 2<sup>nd</sup> Respondent failed to declare him so."*

4. In addition, the petitioner had other complaints in paragraph 2 of the petition relating to alleged failure to observe the principles of free, fair and transparent elections, favouritism, improper motives, alterations and cancellations on statutory documents, agents failure to sign Forms 35, erroneous transfer of results from Form 35 to Form 36 and declaration of wrong results. The prayers for nullification of the election for the alleged unconstitutionality and breach of elections law was expressed to be in the alternative to prayer for the Petitioner to be declared the winner of the election upon the correct count of the votes as recorded in Form 35.
5. The respondents filed their respective responses to the petition together with affidavits in support of their responses. The petitioner called 5 witnesses; the Respondents jointly called 4 witnesses. Final submissions were made on 1<sup>st</sup> October 2013 and judgment reserved for the 7<sup>th</sup> October 2013 before expiry of the constitutional 6-month period for determination of election petitions.
6. There was common understanding as to the jurisdiction of the court in election petitions and the burden and standard of proof. It was accepted across the board that the burden of proof is higher than the ordinary civil proceeding standard of balance of probability but not as high as the beyond reasonable doubt of criminal proceedings save in election offences which retain their criminal procedure standard of beyond reasonable doubt. See Supreme Court decision *Raila v. IEBC* Petition Nos. 3, 4 and 5 of 2013. As regards the criteria for validation or invalidation of an election, section 83 of the Elections Act empowers the election court to validate or invalidate an election following an election petition if the conditions set out in the section exist. The section

provides as follows:

*“83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”*

7. The parties also accepted as a general guide the propositions in ***Morgan v. Simpson*** (1974) 2 ALL ER in interpreting a statutory provision similar to our section 83 of the Elections Act when after considering the case law on the issue, Lord Denning MR. said:

*“Collating all these cases together, I suggest that the law can be stated in these propositions:-*

1. *If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not...*
  2. *If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election...*
  3. *But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the results – then the election is vitiated...*
8. **In their broad categories, therefore, the issues for determination in the election petition are three:**
- a. **Whether there are any irregularities or breaches of law proved;**
  - b. **Whether there are any election offences proved; and**
  - c. **Whether any irregularities, election offence and breaches of the law proved amount to substantial breach of the constitutional and Elections Act or whether the said irregularities, offences and breaches of the elections Act affect the result.**

## 9. General aspects

There was an attempt to describe the demographic representation in the various wards of the constituency and to link the ethnic composition of the wards to the outcomes or expected outcomes in votes in order to explain the gains or losses of different candidates in the particular areas. The dangers with that kind of evidence are obvious in that the persons who testified were not experts in the anthropology of human settlements Kisii region; the testimony was not backed by any statistical data from the bureau of statistics or other official data on the settlement of the people in the constituency; there is no scientific way of correlating the voter's tribe or sub-tribe or clan or sub-clan with his propensity to vote in a certain way; the type of analysis is based on tribalism which has retrogressive effect in terms of national unity and reconciliation, and giving effect to any such perceived co-relation may promote division rather than unity in the community represented in the voter component of Nyaribari Chache Constituency.

10. Accordingly, I cautioned the counsel and witnesses in the case that such evidence of its own, without more, being plainly a matter of personal opinion of the non-expert witnesses of little weight without proved supporting facts, would not sway the court one way, or the next, or anyway. As observed in *Evidence for Magistrates* by Philip P. Durand, Part I (1969) at p.143 –

*“An opinion must be founded on good reasons which are supported by facts, otherwise it is worthless as evidence. Therefore where the law of evidence allows a witness to state an opinion, the witness is also allowed to state the facts upon which the opinion is based; indeed this is a prerequisite...”*

## Application of scrutiny

11. Upon an application for scrutiny and recount this court declined to order for scrutiny in all the 111 stations on the reasoning that since it was clear that the petitioner's case is in the computation of the figures in Form 35, there could therefore be no basis for scrutiny of the votes when the petitioner already accepts the votes he has garnered as entered in Form 35 and his grievance was only in their computation and reflection in the constituency Form 36. The court also noted that the Respondents had admitted the errors in the Forms 35 and Form 36 in a consent recorded in court as follows:

**“Court: Upon hearing Counsel for the parties. I adopt the consent in terms that the parties agree that there were errors of addition and transposition in some polling stations, with respect to the transposition from form 35 to form 36 as filed by the petitioner Annexure RNT 2 and RKN 6. The Petitioner will compile a report on the polling stations and candidates affected and submit a report to counsel of the other parties and subsequently to court on 8/8/2013 at 9.00 a.m.”**

The parties did not however record the further consent on the polling stations contemplated in the order.”

12. Moreover, the court found that the petitioner has not demonstrated that the said errors or irregularities have resulted in a change in the outcome of the election. The Court however, considered that as a court of law, the election court cannot appear to condone illegality in the election process and it would therefore investigate cases of alleged breaches of the law even where these were not set out in the pleadings but only came up in the course of the trial.

13. In that regard, the court considered that it was a legitimate objective of a court of law, through the provisions of section 82 of the Election Act on scrutiny, when confronted with **prima facie** evidence that persons not registered in the registers of election available at a polling station were allowed to vote allegedly after confirmation with the Returning Officer from the Registration Centre Reference Book (Green Book), to establish that such voters were duly registered.

14. This followed cross-examination of the Returning Officer (DW4) by the counsel for the petitioner and counsel for the 3<sup>rd</sup> respondent on the contents of a total of 63 Poll Day Diaries for various polling stations revealing that there were several stations where the Electronic Voter Identification Device (EVID) failed and the voters could therefore only be identified manually. Yet in other stations, the names of voters were not reflected in the manual Principal Register or the electronic register at the polling station, and the Presiding Officers allowed the voters to vote after allegedly confirming with the Returning Officer that the name of the voter appeared in the Registration Centre Reference Book (Green Book). The problem affected a total of 12 polling stations with 84 voters shown as having been missing in one or the other register, or both, with 3 stations noting the fact of voters missing on the registers but not indicating the number of voters allowed so to vote. In two of these stations, Gusii County Council stream III and IV, the voters were in the course of trial established to be on the Green Book for the registration centre, a copy of which was attached to the replying affidavit of the Returning Officer DW4.

15. The Court considered that the scrutiny would apart from establishing whether the votes in the stations are valid to the extent that they are cast by persons registered or not registered as voters, also establish whether an election offence has been committed, not only as a way of gauging the compliance of the election body with the constitution and the election law in terms of section 83 of the Elections Act, but also for purposes of the reporting requirement of section 87(1) of the Elections Act.

16. I considered also the nature of election petitions with a requirement for reporting of election offences which may require that evidence be taken that may lead to establishing whether any person had committed an election offence in terms of section 87 of the Elections. Section 87 (1) of the Elections Act is in the following terms:-

*“87. (1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.”*

17. The Court also took the view that the circumstances surrounding the delivery of the votes from St. Teresa Amasago stream II to the Tally Centre with conflicting evidence as to whether the ballot box containing the National Assembly ballots was open, and the correct registered voters shown on the Form 35s for the two streams, called for an examination of the votes against the registered voters in the polling station as shown in the registers at the station and in Registration Centre Reference Book (Green Book). The court therefore ordered for scrutiny in the affected polling stations.

### **18. Approbation and Reprobation**

Counsel for the 3<sup>rd</sup> Respondent object that the petitioner’s case inconsistently partly lies in the accepting the validity of Form 35 and seeking the declaration of the petitioner as the winner on the basis of the totals of the Votes in the said forms and partly on alleged contravention of the constitution and the election law in seeking the nullification of the election. Citing section 120 of the Evidence Act counsel submitted that the petitioner could not approbate the election and reprobate at the same time. Section 120 of the Evidence Act is in the following terms:

*“120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”*

19. I consider that the prayers having been presented in the alternative may rely on different grounds and evidence. I do not see that the petitioner has sought to deny the truth of the Form 35s. It appears to me that the prayer for nullification of the election is based on grounds other than the validity of Form 35s.

### **20. Admissibility of photographs**

An objection was taken as to the admissibility of the colour copies of Photographs marked SOO1 attached to the affidavit of Onyango in support of the petition. In the interests of expedition in the hearing of the Petition, I upon objection taken in the course of the proceedings directed that cross-examination of the deponent and other witnesses proceeds on the copies of photographs subject to counsel making submissions on admissibility thereof in the final argument.

21. I made a similar direction with to a question as to the cross-examination of DW4, the Returning Officer for the Nyaribari Chache Constituency, the 2<sup>nd</sup> Respondent herein, using information recorded in Poll Diaries for various polling stations on the issue of persons who were allowed to vote when their names did not appear in one or more of the three election registers – the Principal Register at the Polling station, the Voter Registration Book (Green Book) and the Electronic Voter Identification Register (EVID), on the principal ground that the issue was not pleaded in the Petition or otherwise raised in the affidavits filed in support of the petition. In ordering scrutiny of votes in some 12 polling stations I reasoned that although the petitioner had not shown sufficient basis for the order of scrutiny in accordance with the principles for the grant thereof scrutiny would be ordered to establish if a criminal offence had been committed with regard to the voting by persons not registered in register of voters.

22. Such arguments were then made in the final submissions as directed. That course of action of

deferring the determination of the objection as to the pleadings and the nature of the evidence sought to be adduced to the final submissions in the petition was not without precedent, and I noted that in the Caribbean decision of **Quinne-Leandro v. Jonas Maginly AG** (2010) CA 8 the court deferred consideration of objections as to inclusion of hearsay evidence:

*“ In an effort not to protract the hearing of substantive petitions and at the commencement of the hearing, the court, having listened to all learned senior counsel, ruled that the substantive hearing of the petitions would commence and that the respondents would be permitted to cross-examine the witnesses. This was without prejudice to their right to have the matter of inadmissibility of the evidence dealt with and addressed in their closing arguments. This resulted in the court being faced with having to address several submissions in closing that dealt with various objections to the admissibility of myriad aspects of the witness statements.”*

### **23. Objection on Matters not pleaded in the petition.**

It is trite law that in civil proceedings, of which election Petitions are a specie, issues are raised by way of pleadings and there is a rule the court can only lawfully determine issues that are specifically pleaded and proved before it and that the court cannot base its decision on an un-pleaded issue. This is the rule in **Gandy v. Caspair Air Charters Ltd.** (1956) 23 EACA 139 where Sir Sinclair, V-P, said

*“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent, As a rule relief not founded on the pleadings will not be given.”*

24. Accordingly, as a general rule the court may only rely and rule on matters that are specifically pleaded in the petition. There are exceptions to the general principle as I discussed in **Eng. Peter Kimori Maranga and Anor. v. Joel Omagwa Onyancha and 2 Ors.** Petition No. 7 of 2013 as follows:

#### **“Whether matters arising in the course of hearing may form the basis of judgment.**

*I was asked by the counsel for the respondent to enforce the principle of pleadings that parties are bound by their pleading and that therefore the judgement of the court could not be based on an issue which is unpleaded. I had earlier considered the matter of unpleaded issue in an objection raised by counsel for the 1<sup>st</sup> respondent against proposed cross-examination:*

*“I have considered the objection, and I would agree with the counsel for the Respondents that there is an issue of prejudice if the petitioners are permitted to put the question to the witness without notice through prior pleading or affidavit evidence. **I would have upheld the objection were it not for the serious implication of the information alleged in the letter. If it were true, the question of legality of the 1<sup>st</sup> Respondent’s nomination and election would arise. Such a question is in my view of such fundamental moment that a court of law cannot ignore to the extent that the court would be seen to have condoned an illegality.** I would therefore allow the question to be put to the witness. As regards, the issue of putting the document into evidence, the court may on the basis of the contents of the letter, and the response to be given by the Respondents, if necessary summon as a court witness the Registrar of Political Parties under section 80 of the Elections Act.*

***However, the 1<sup>st</sup> respondent must be granted an opportunity to prepare to respond to the information contained in the letter, by making any necessary inquiries to mount their response and defence.”***

As held in **Odd Jobs v. Mubia**, (1970) EA 476, CA a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. Again a court may give judgement on an unpleaded issue where an un-pleaded cause of action had become an issue in the trial. As Duffus JA said at p. 520, the omission to plead is an irregularity and where such an irregularity clearly did not affect the merits of the case, it would be a failure of justice if the unpleaded issue is rejected. See also **Transworld Safaris (K) Ltd v. Ratemo** (2008) KLR 339, applying **Odd Jobs v Mubia** supra.

Moreover, as held by the Court of Appeal in **Mapis Investment (K) Ltd v Kenya Railways Corporation** (2005) 2 KLR 410, no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and of the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded illegality or whether he has not. If evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.

For my part, I have considered that where there is an alleged issue of illegality, I have allowed the matter to be raised notwithstanding that the issue has not been raised in the petition. I consider that the Article 159 of the Constitution allows the consideration of such an issue of alleged illegality notwithstanding non-pleaded status because the rule of law of which legality is a central part is one of the values of the new constitution. There cannot be greater illegality than the contravention of the constitution.

In addition, if election petitions are about the enforcement of the fundamental constitutional right to vote under Article 38 of the Constitution, and any unconstitutional act should be examined without the strictures of the technicalities of pleading. However, being mindful of the object of pleading to inform the respondent of the claim against him and afford him an opportunity to respond, the court must grant an opportunity to the respondent of the unpleaded issue to respond to the issue before decision is based on it.”

25. That is the context in which I would understand the decision of Musinga J, as he then was in **Justus Mungumbu Omiti v. Walter Enock Nyambati Osebe & 2 Ors.** Kisii Election Petition No. 1 of 2008 where it was said:

“All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a constituency must come under spotlight, scrutiny and interrogation. They have interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections ...have to be considered.”

## **26. Admission of Photographs.**

In my ruling of 8<sup>th</sup> day of JULY 2013 in **Paul Gitenyi Mochorwa v. Timothy Moset E. Bosire, Kisii Election Petition No. 8 of 2013**, I considered the application of sections 106 in relation to the admissibility of a video CD attachment to an affidavit, and held:

“Section 106A – 106H of the Evidence Act are, in my view, statutory safeguards for the integrity of documentary evidence in relation to the production of electronic records to secure confirmation of authenticity by persons responsible for the preparation of such records. In relation to admissibility of electronic records, section 106B provides that information contained in an electronic record, which is printed, stored or recorded, or copied respectively on paper, optical or electro-magnetic media produced by a computer shall be deemed as a document admissible in any proceedings without further proof or production of the original as evidence of any contents of the original or of any fact stated

*therein if conditions set out in the section are satisfied in relation to the information and computer involved.*

*The conditions are clearly geared towards vouching for the integrity of the electronic record in relation to the use of the computer by a person having its lawful control; the production of the electronic record by the computer in the ordinary course of business; the proper operation of the computer during the production of the electronic record; and that the information in the electronic record is a reproduction or derivation of such information fed into the computer in the ordinary course of the said activities. The statement in relation to the fulfilment of the conditions shall be given under section 106B(4) by way of a certificate by a responsible person in relation to the operation of the computer and other devices involved in the production of the electronic record. I agree with the courts in two previous decisions of *R. v. Barasa Wayu Mataguda* (2011) eKLR and *Jared Oduyo Okelo v. IEBC & 3 Ors* Kisumu Election Petition No. 1 of 2013 on the need to comply with section 106B of the Act before evidence on electronic recording may be admitted.*

*In my view, in the circumstances of the Election Petitions, section 106B of the Evidence Act shall have been complied with if the conditions set out in section 106B(2) on the production of the electronic record are certified before the court either by an affidavit by the witness who wishes to testify to the court of his involvement in the production of the electronic record in compliance with the conditions set out in the section or by a certificate under subsection (4) of section 106B being a statement in evidence signed by a responsible person in the operation of the devices and activities undertaken in production of the electronic record, which certificate may be produced either by the person who certifies it or a witness to whom it is given for purposes of presentation in the court proceedings.*

*In the circumstances of this case, the 1<sup>st</sup> Respondent could either present a certificate under sub-section 4 of section 106B prepared by a person responsible for the operation of the devices used in the production of the electronic record, as contended by the Petitioner in his preliminary objection, or call the person who made the electronic record himself as a witness to testify to the satisfaction of the court on the due compliance with the conditions set out in sub-section 2 of section 106B of the Evidence Act.”*

27. In the present case the petitioner has not produced a certificate under section 106B (4) of the Evidence Act and the person who operated the computer and printer during the printing of the photographs was not called to testify as to the condition of the machines and the integrity of process of the printing of the photographs. The person who testified was the photographer who although he stated that he was with the computer operator when the photographs were made cannot vouch for the due operation of the computer and printer and the integrity of the photographs having himself admitted that they would at times sit with the operator to choose colours in which the photographs would be printed. The court cannot rule out the possibility of doctored photographs, and in accordance with section 106B, the photographs are inadmissible and shall not be considered.
28. Counsel for the petitioner had in his submissions before the court defended the photographs on the basis that since the respondents had cross-examined the witnesses on the photographs, they were estopped in terms of section 120 of the Evidence Act from now turning back to reject the photographs which they had already used in the cross-examination of witnesses. Counsel for the Respondents countered that their cross-examination was in accordance with the directions of the court and without prejudice to their right to make submissions on their admissibility, pointing out that estoppel does not operate against the provision of Statute. I accept the principle of law that the operation of a statute cannot be affected by estoppel, acquiescence or waiver. See for example *Tarmal Industries Ltd. v Commissioner of Customs and Excise* (1968) EA 471; *Doge v Kenya Cannery Ltd* (1989) KLR 127 and *R. v Kenya Revenue Authority ex. p. Aberdare Freight Services Ltd.* (2004) KLR 530.

29. I therefore find that the photographs marked SOO1 are not available for use by any party before the court having been produced without due compliance with section 106B of the Evidence Act. The court will nonetheless consider the testimony of the photographer and the other witnesses as eye-witness accounts.

### **Specific irregularities**

#### **30. The issue of Unsealed ballot boxes**

The Petitioner called a photographer PW3 to produce pictures to show that a certain vehicle had delivered ballot boxes from Amasago Polling station some with the aperture open. Having overruled the use of the photographs, the witness's evidence is only to the extent that he was at the tallying centre when the vehicle arrived at about 1.00pm; that there was noise when the vehicle arrived; the vehicle carried 4 or 5 ballot boxes and they were offloaded from the car's boot by the Returning Officer who wanted to show that the boxes were okay. He said: ***“The car had boxes in the front and other at the back. One of the box was found to be opened. When I took the persons of the boxes, the petitioner and Hon. Bichage were present and they were worried as to what was going on. The senator box was not tightened at the seals.”***

31. PW5 the chief agent for wiper party, the petitioner's wiper party testified that he was present when the ballot boxes arrived and they protested the inclusion of the vote because they had been brought in late at 3.00pm when counting of the votes had ended at 6.30am while the station is one of the nearest to the Tallying centre. He alleged that they had agreed to exclude the station. DW4 explained that the vehicle had come in late following the need to make alternative transport arrangement on account of delay in the officially allocated vehicle for the two stations of St Teresa Amasago because of the long queue at the Tallying centre. He said:

*“The queue for the presiding officers, vehicles started from the tallying centre all the way outside the gate. The queue on 5/3/13 was long. It took approximately 6 hours after standing on the queue to be finally cleared.*

*The motor vehicle KAS 182Z was coming from stream I, St Teresa Amasago. I did not supply the list of vehicles contracted to the parties. The list at “WD002” affidavit of Wilfred O. Bosire contains 95 vehicles. There are 110 polling stations. I covered the deficit. Not all the 95 vehicles were assigned duty. I received other vehicles at the tallying centre which are not counted in the list. I used a total of 107 vehicles. For the deficit of 3 stations, I assigned 1 vehicle to cover 2 streams for Amasago which is 500 metres from the tallying centre. I thought that once the first stream had delivered its ballot boxes the vehicle would still go back to the polling station and bring the other stream. Because of the long queue and the counting depended on the number of registered voters, the streams at Amasago with around 780 votes finished counting at around 6.30am on 5/3/2013. They immediately came to the tallying centre as the other stream was still counting. They found a long queue. This was stream II and they joined the queue around 6.40am on 5/7/13. Stream I cleared counting later at around 8.30am on the same day. The presiding officer called me that they had finished counting and they need a vehicle to carrying the boxes to the tallying centre. I wanted to send a vehicle that I had cleared from another station because the Amasago one was on the queue. The vehicle that I had wanted to send that I had cleared was not able to go to Amasago because the vehicle was blocked by vehicles coming in from Amasago side.*

*At around 10.00am, the presiding officer could not wait and he called me and requested me that there was a vehicle at the compound from St. Teresa Amasago and that the owner was the deputy presiding officer of stream II which was on the queue. He requested that he uses the vehicle to ferry the ballot boxes to the tallying centre. I asked him whether the vehicle was capable of bringing the 6 ballot boxes together with the presiding officer and security officer. After confirming this, I allowed the vehicle to ferry the boxes so long as*

*the presiding officer and the security officer could be accommodated. When the vehicle arrived the presiding officer and the security officer were in the vehicle.... I removed all the six ballot boxes....*

*I had come from announcing the results in tallying centre and I did not have any seal with me. The box that I was holding had the aperture fully sealed.... The ballot boxes produced in there were the same as the one which I was removing ...”*

32. The ballot boxes were produced before the court with their seals intact and although the seals could have been placed at the Tallying Centre during the incident in question, I do find that it has been proved to the required standard that the ballot boxes for St. Teresa Amasago were open as they were delivered to the Tallying centre.

### **33. The use of Green books**

Counsel for the petitioner submitted that the use of Green Books at the tallying centre to confirm the registration or otherwise of voters through telephone calls to the 3<sup>rd</sup> respondents call centre without involving the agents of the respective candidates and or parties to confirm their registration offended principles of accountability and transparency rendering the election not free and fair as required by the constitution.

34. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents explained that the Green books were reference books which could not for reasons of integrity be sent out to the polling stations and had to remain in the custody and care of the Returning Officer. The returning officer explained how the call centre worked to confirm to the presiding officers those voters whose names did not appear in either the EVID register or the principle register. DW4 said:

*“The above persons were registered voters and the evidence in the registration centre reference book, the green book. I did not make any mistake in allowing them to vote. The other allegation about person allowed to vote had been raised in the petition so I had not brought the green book. I did not sent the green book to the polling stations because it is a reference book. This is only document IEBC has as the original registration in a polling station. We could not wish to send the green book to the polling station for the risk of losing it. It was the primary reference book for the registration of the voters at the polling station.”*

35. In considering the issue of different registers the Supreme Court determined that all the three registers were part of the Register of Voters and they could all be used to ascertain whether a person was registered as a voter. The Court said:

**“[248] The 1st and 2nd Petitioners’ cases turn on the validity or invalidity of the “Principal Register of Voters.” The point was taken up in evidence, and was substantially canvassed in the submissions. What is the “Principal Register of Voters”? In the light of the provisions of the Constitution [Articles 38(3) and 83] and of the Elections Act, 2011 [Sections 2, 3, 4], and of the evidence adduced in Court, we must conclude that such a register is *not a single document*, but is an amalgam of several parts prepared to cater for divers groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country’s population. The register can also take several forms, as contemplated by Section 2 of the Elections Act, which stipulates that such a register “includes a register compiled electronically.”**

**[249] The multiplicity of registers is a reality of Kenya’s voter registration system which is recognized in law and widely acknowledged in practice. The register once developed and finalized, is disaggregated and dispersed to various electoral units, to facilitate the process of voting. Such units include the polling**

stations, the wards, the constituencies, the counties, and even the Diaspora voting centres.

[250] It is plain to the Court that the argument of the Petitioners that the Presidential elections of 4th March, 2013 could only have been based on the BVR element of the Principal Register of Voters, is not tenable; nor is it tenable to contend that the BVR Register all by itself, was the Principal Register of Voters.

[251] To guarantee the credibility of the voter register, the agency entrusted with responsibility (IEBC) for voter registration must ensure as follows:

- (a) All those who turn out to register are qualified to be registered, in accordance with the constitutional and legal requirements;*
- (b) All those who turn out to register are actually registered and their particulars accurately captured;*
- (c) The administrative arrangements put in place to facilitate the registration process are simple, transparent and accessible;*
- (d) The public and political actors are kept informed of the various steps in the register-preparation process;*
- (e) The resultant register is verifiable.*

[252] We are inclined to accept the explanations given by the 1st and 2nd Respondents, of the mode of compilation of the voters' roll. The depositions of the 2nd Respondent and of Immaculate Kassait, and especially when taken alongside the submissions of learned counsel, Mr. Nyamodi, have conveyed a credible account on the manner in which the voters' register used in the 4th March, 2013 Presidential election, was prepared. *The legal burden of showing that the voters' register as compiled and used, was in any way in breach of the law, or compromised the voters' electoral rights, was not, in our opinion, discharged by the Petitioners.*"

36. In these circumstances then, the only question for determination would be whether the use of the Green Book in circumstances where the agents of the parties and or candidates were not able to verify that the particular person was registered as a voter was offence against the constitutional requirement for accountability and transparency.

37. In the evidence before the court it was clear that the method of comparison with the voter registration through the Green Book was a back up device and not the primary method of ascertaining who was or was not a voter. Indeed, in the case before the court only 84 voters as shown the 63 Poll Day Diaries on which DW4 was cross-examined were processed in this manner when after their names with missing in the one or the other register but were captured in the other of two registers – the Principal Register and the Electronic Voter Registration Device (EVID) which were available at the polling station - and when missing in both by comparison with the Green Book available at the Tallying Centre. An analysis of the 63 polling diaries with respect to the cases of the voters allowed to vote after comparisons of the registers is set out below:

#### **POLL DAY DIARIES ANALYSIS**

<b>POLLING STATION CODE/ STREAM AND NAME</b>	<b>Voters IN REGISTER BUT NOT IN EVID</b>	<b>Voters IN EVID BUT NOT IN REGISTER</b>
<b>001 Kegati Pri. Stream I</b>	<b>5</b>	<b>9</b>

Stream II	0	0
003 Nyamemiso Stream II	0	0
004 Nyanko Stream I	0	0
005 Jogoo Primary Stream III	0	0
Stream II	0	0
Stream I	0	0
<b>006 Bobaracho Pri. Stream I</b>	<b>22</b>	<b>18</b>
Stream II	0	0
007 Nyamage Stream I	0	0
<b>008 Nyanguru Pri. Stream I</b>	<b>0</b>	<b>1</b>
013 Keumbu Stream I	0	0
016 Marine Fisheries	0	0
017		
018 Masongo Pri.	0	0
019		
<b>020 Gekomu Pri. Stream I</b>	<b>0</b>	<b>2</b>
Stream II	0	0
022 Kisii Pri. Stream III	0	0
Stream I	0	0
Stream II	0	0
Stream IV	0	0
Stream V	0	0
<b>025 Gusii Stadium Stream II</b>	<b>1</b>	<b>3</b>
<b>Stream III</b>	<b>1</b>	<b>1</b>

<b>Stream I</b>	<b>4</b>	<b>0</b>
<b>026 Gusii County Council Str. II</b>	<b>Number not specified</b>	<b>Number not specified</b>
<b>Str. I</b>	<b>Number not specified</b>	<b>Number not specified</b>
<b>Str. IV</b>	<b>1</b>	<b>1</b>
<b>Str. III</b>		<b>7</b>
<b>027 Otamba Pri. Stream II</b>	<b>4</b>	
Stream I	0	0
029 Gusii Municipal Hall Stream II	0	0
Stream I	0	0
Stream III	0	0
032 St Teresa Amasago Stream I	0	0
Stream II	0	0
033 Nyamware Pri. Stream I	0	0
037 Erema Pri Stream	0	0
038 Chindwani Stream I	0	0
042 Nyabiuto Pri.	0	0
043 Nyaguta Pri. Stream I	0	0
044 Nyaboribonge stream I	0	0
046 Amariba Pri. Stream I	0	0
047 Mogorara Pri. Stream I	0	0
049 Matunwa Pri. Stream I	0	0
<b>050 Kiogoro TBC Stream I</b>	<b>Number not specified</b>	<b>Number not specified</b>
Stream II	0	0
051 Nyangowa TBC Stream I	0	0
052 Rianyamwamu Pr. Stream I	0	0

053 Nyanderema Pri. Stream I	0	0
056 Nyang'eni Pri. Stream I	0	0
057 Birongo Pri. Stream I	0	0
Stream II	0	0
058 Nyansira Pri. Stream I	0	0
060 Boruma Pri. Stream II	0	0
Stream I	0	0
<b>063 Kenyerere TBC</b>	<b>3</b>	<b>0</b>
065 Kabosi Pri. Stream I	0	0
067 Nyamacheo Pri. Stream I	0	0
Stream II	0	0
069 Riangabi Pri. Stream I	0	0
073 Nyamagwa Pri. Stream I	0	0
<b>078 Rianyega TBC</b>	<b>1</b>	<b>0</b>
080 Nyanturago TBC Stream I	0	0
Stream II	0	0

38. From the evidence, it was not the case that the 2<sup>nd</sup> respondent adopted a method of voting through the Green Book by use of telephone calls to the call centre at the Tallying Centre: it was only for the small number of voters whose names were missing from the registers at the polling station.

The explanation given by the 2<sup>nd</sup> respondent that the Green Book as the reference register had to be kept in the protective custody of the Returning Officer rather than at the disposal of the polling streams in the polling centres appears reasonable in the circumstances.

39. The voting procedure is set out in regulation 69 of the General Regulations 2012 as follows:

“69. (1) Before issuing a ballot paper to a voter, an election official shall—

(a) Require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;

(b) Ascertain that the voter has not voted in that election;

(c) Call out the number and name of the voter as stated in the polling station register;

(d) In case of an electronic register, require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter once the

*image has been retrieved;*

*(e) mark the name of the voter to indicate that the voter has been issued with a ballot paper and retain the voter number of the voter as proof that a ballot paper has been delivered;*

*(f) Stamp the counterfoil of the ballot paper on the face with the official mark of the Commission; and*

*(g) Stamp the ballot paper at the back with the official mark of the Commission.”*

40. The Regulations require the crossing out of the voters name on the electronic register and the marking of the name of the voter to indicate that the voter has been issued with a ballot paper and retain the voter number of the voter as proof that a ballot paper has been delivered. I would therefore agree with counsel for the petitioner that in case of voters being allowed to vote after authorisation of the Returning Officer that their names appear on the Green Book are not recorded anywhere the accountability of the voting system would be affected because the ballot boxes and the figures shown on the record of Form 35 of the votes cast could never be verified for want of record of voters in the register.
41. I however do not agree that the few cases where this happened in the named stations – and this was in only of the 63 Polling diaries examined – that this amounted to any systematic procedure adopted by the 2<sup>nd</sup> respondent in contravention of the election law to cross-check the voters from the register. Indeed, the Supreme Court confirmed that the register of voters in Kenya is made up of multiple register and the use of one or the other to identify any voter cannot be said to contravene in any substantial way the election law in terms of section 83 of the Elections Act.
42. I however consider that failure to involve the agents in the procedure for ascertainment of the registration of the persons as voters and the failure to record persons who so voted are irregularities in contravention of the constitutional principle of accountability and transparency. If a person came into a polling station and obtained a ballot paper from the Presiding Officer without having his registration verified in the register, the agents for the candidates and political parties would be entitled to complain about this lack of accountability transparency because the Presiding Officer might have allowed a person who is not registered as a voter to vote.
43. In what amount to the same thing, if a Presiding Officer, in respect of a person whose name cannot be traced in any of the registers at the station, made a private call to the Returning Officer who privately confirms that a voter is registered and therefore allowed to vote, **without any record of the person so voting**, the accountability mechanism of crossing-out the voter’s name and marking out the name and number of the voter as having been issued with a ballot is defeated. In such circumstance a person whose name does not appear in any of the registers may vote without any record of his voting to aid in accountability should it become necessary for instance to carry out a scrutiny.
44. There cannot be an objection therefore for those voters who are recorded in the Poll day diaries for the respective polling stations. Only one person was shown not to have been registered on all the three registers and it is not clear from the Poll Diary whether he was allowed to vote. It was established that there was a complaint in a number of 16 polling stations that the presiding Officer had been unable to reach the returning officer and although the business that the presiding officers wanted to discuss with the Returning Officer is not disclosed, the prospect that they may have sought to verify the registration of some voters means that some registered voter may have been disenfranchised.
45. During cross-examination by counsel for the petitioner, DW4 responded to issue of failure of EVID at some polling stations as follows:

*“[Kiogoro TBC 050 stream I]*

*At p. 25 presiding officer remarks that EVID battery went off at 9.00am. He also said that he had problems transmitting results by phone. EVID failed to recognize fingerprints. The*

*presiding officer took action by getting power for the EVID and he called the transmission personnel who informed him that there was transmission error on the phone. The voters who had their names not in the EVID were highlighted in the field note book.*

*Field notebooks are contained in the material checklist and p. 2 as no. 19. The presiding officer has indicated NIL against the field notebooks. It means that he did not receive any notebooks.*

*At p. 12 record of materials and problems. Problem no. 2 is that “when we need help from our respondents IEBC officials at the tallying centre you do not get it at all”. No response from tallying centre. He also said that he had shortage of materials. i.e enough envelopes to sort the ballot papers.*

*Presiding officer records problem of voters not in the EVID machine but in the register*

*[All the 16 poll diaries, the presiding officers confirmed that when there were problems in the EVIDs they were unable to get to the returning officer] I do not agree that they could not get through to me.*

*[Nyamanwe 073 poll diary]*

*Presiding officer states that all the lines seemed to be busy. The presiding officer states that this necessitated .....without completing the sentence. At p. 25, presiding officer records that he is unable to get through the returning officer.”*

If the Presiding officers could not get to the returning Officer because the lines were busy and if some Presiding Officer records in a non-existent Field Book, the name of a voter whose name did not appear in the registers, the dangers of, respectively, voter disenfranchisement and non registered persons voting become real.

46. The voters being allowed to vote because they appear in one or the other register but a proper record is not kept as required by the regulations would make the accountability and verifiability of the system impossible as such votes though appearing in the ballot box would be accounted for. This would have a direct effect on the accountability of the result in terms of Article 86 of the Constitution.

#### **47. Favouritism**

It was contended for the petitioner that the party that sponsored 3<sup>rd</sup> respondent was allowed to nominate more than two agents in at least 15 polling stations; that a witness went to spend the night with the officials of the 2<sup>nd</sup> Respondent; and that nomination of more than one agent is contrary to section 30 of the Elections Act and Regulations 62 restricting one agent per party. There has been no explanation for the contravention of the law and it leads to a conclusion that a favour was being extended to the 3<sup>rd</sup> respondent.

48. An examination of the Poll diaries presented before the court through the 2<sup>nd</sup> respondent affidavit and with leave of the court, it was revealed that several parties and not just the 3<sup>rd</sup> respondent's party had more than one agent in many stations. The Petitioner's party also had 2 or more agents in some stations.

PW2 the chief agent who alleged that he was a Ford People chief agent without supporting documentation, testified that he was not allowed to enter a polling station. The returning Officer DW4 explained that some presiding officers allowed 2 agents per candidate or party – one as polling and the other as tallying agent – who would be in accordance with the regulations be in the polling station at different times of the polling exercise. Regulation 62 (3) absence if agents shall not invalidate the proceedings at a polling station.

That an agent may have gone to a polling station the night before and spent the night at the polling station is not of itself evidence of favouritism. The presiding officer together with all the other agents present at the opening of the polling station at 6.00am would have to confirm that the ballot boxes are empty and take down the serial numbers of the ballot papers and the seals on the boxes in accordance with regulation 67 and 68.

I do not find it proved that there was favouritism for the 3<sup>rd</sup> respondent.

#### **49. Accuracy in the transposition of votes from Form 35 to Form 36.**

It was contended for the petitioner that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had given inaccurate figures contrary to the provisions of the constitution requiring accuracy under Article 81 (e) iv and (v) of the Constitution. It was pointed out that by the Form 36 figures the margin difference between the 3<sup>rd</sup> respondent and the petitioner was 145 votes. Later, the 2<sup>nd</sup> respondent gave in his replying affidavit a reworked figure of 1021 as the correct margin of difference.

50. It was contended that there was a difference of 1622 votes between the total votes cast as shown in Form 36 allegedly at 46608 and in the tally before the court at 48230 and that because these had not been accounted, the assertion that there were massive errors had been proved on a balance of probabilities to call on the respondents to bear their burden of proof. With respect, this submission is incorrect: that there was an error in the computation of the totals on Form 36 does not reveal that there were massive errors in the election. Moreover, the errors in computation where by erroneous figure are transferred from the primary document Form 35 onto the constituency Form 36 does not translate into votes which can be claimed by any candidate. It only means that in the verification of the correct figures for the election regard is to be had of the Form 35s which are the primary source of the election results.

51. I have observed that in my ruling on the scrutiny application herein that the 1622 did not represent votes that could be claimed by any of the candidates. It arose as a result of a question in cross-examination when the DW4 was asked by counsel for the petitioner to get the difference between total of valid votes cast as shown on Form 36 and the correct total amount as tallied in court. I observed:

*“The error in tallying the votes on to Form 36 where valid votes are given as 46,608 against the correct computation done in court at 48,230 showing a difference of 1622 is a computation error and not votes that could be claimed by any party to the election: the candidates can only trace their votes to the primary document Form 35 and not the tallying sheet of Form 36.”*

It does, however, confirm that the Form 36 was not accurate in its total tally for valid votes as 46608 rather than the correct total of 48230. Indeed even the final tally of the votes cast in the corrected Form 36 at 48190 there is a difference of 40 with the tally carried out in court at 48230.

#### **52. Errors in Form 35.**

There was admitted 32 polling stations with corrections which the Returning Officer said were error mainly in arithmetic sections of items No. 1-7 of Form 35. As I held in election Petition No 8 of 2013, “there is no requirement that the entries on Form 35 or any other form be without alteration. The constitutional requirement for accuracy in election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has been corrected, an impossibility in all human endeavour; accuracy will be served, if there exists a means of verification of the entries to test for their accuracy and it necessarily imports corrections by alterations, whether countersigned or not.”

53. DW3 the Presiding officer for Bobaracho polling station admitted that he made an error in the entry of votes. The returning officer DW4 also admitted errors in Form 35s and to mistakes in the transferring results from Form 35 to Form 36 which results he said he announced as provisional

results under section 39 of the Elections Act. After a final tally, the witness said the margin of difference between the 3<sup>rd</sup> respondent and the petitioner was 1021 votes.

**54.Failure by Agents to sign Forms 35.**

The court observed in the ruling on application for scrutiny that:

*“As regards the petitioner’s complaint that some Form 35s for the certain named stations have not been signed by agents – Birongo, Nyanguru, Gusii Municipal Council stream I, Gekomu stream II, Jogoo primary II, Nyanturago stream II. This defect cannot of its own call for scrutiny because an election result will not be vitiated by reason of failure or refusal by candidates or agents to sign the statutory form or to give reason for refusal or default, in view of the saving clauses of Regulation 79 of the Election (General) Regulations 2012 under the Elections Act in the following terms, so far as material –*

**“(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.**

**(4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.**

**(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.**

*(6) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).*

*(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.”*

*The defect may however be part of the petitioner’s case to be presented in the final submissions together with other matters including the alleged favouritism of the 3<sup>rd</sup> respondent, the alleged irregularities and inaccuracies in the tabulation and posting of results in Forms 35 and Form 36 and the allegation that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not substantially comply with the constitution and the election law in terms of section 83 of the Elections Act. As such, it ought to be the subject of final argument in seeking to establish that the quality of the elections fell below the standards of the constitution and the election law in terms of section 83 of the Election Act.”*

55.The court therefore considers whether the failure by agents to sign the forms 35 together with any other irregularities proved herein will amount to substantial non compliance with the election law as set out in the constitution and the Elections Act. As provided under regulation 79 shown above the failure of agents to sign Form 35 or to give reasons for the failure or refusal cannot invalidate an election.

56.I do not consider that the complaint for which no evidence was led the agents at Gusii County Council were kept several metres away so that could witness the actual votes entered onto form 35 as valid because the agents were not required to sit with the electoral officials. They were only required to witness the Form 35 after the results for the candidates were announced and entered onto Form 35. Regulation 76 provides as follows:

76. (1) *The presiding officer shall, in the presence of the candidates or agents—*

*(a) Open each ballot box and empty its contents onto the counting table*

or any other facility provided for the purpose and, shall cause to be counted the votes received by each candidate; and

(b) Record the total number of votes cast in favour of each candidate.

(2) Each ballot paper shall be counted as follows—

(a) The presiding officer shall in respect of every ballot paper, announce the candidate in whose favour the vote was cast;

(b) Display to the candidates or agents the ballot paper sufficiently for them to ascertain the vote; and

(c) Put the ballot paper at the place on the counting table, or other facility provided for this purpose, set for the candidate in whose favour it was cast.

(3) The presiding officer shall record the count of the vote in a tallying sheet in Form 33 set out in the Schedule.

(4) A candidate or an agent shall have a right to—

(a) Dispute the inclusion in the count, of a ballot paper; or

(b) Object to the rejection of a ballot paper, where upon the presiding officer may decide to uphold or reject the complaint and act as provided under Regulation 80.

## **57. Judicial Restraint**

Counsel for the 3<sup>rd</sup> respondent asked the court to exercise judicial restraint on the question whether to invalidate the election. The court's jurisdiction to invalidate an election is circumscribed by section 83 of the Elections Act itself. Case law on the issue of invalidation of election in my view exemplify the judicial compliance with the provision of law rather than restraint as in **Morgan & Others -VS- Simpson & Another [1974] 2 ALL ER 722 at 728**. In **John Fitch -vs- Tom Stephenson & 3 Others, QBD(2008) EWHC 501 it was held:**

*“The decided cases, including those which Lord Denning considered in Morgan -vs- Simpson, established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. This is because where possible, the courts seek to give effect to the will of the people...”*

58. The Supreme Court of Kenya gave a subtle response to an invitation to exercise judicial restraint recommending the scrupulous observance of the constitution and the law:

“[226] In this inaugural Supreme Court which is barely two years old, and which is at the centre of the governance processes established under the Constitution of Kenya, 2010, it is the *first time* the Judges are called upon to declare their perception of their role in a fundamentally political-cum-constitutional process. It is particularly significant that the organ which is the subject of dispute is the most crucial agency of the Executive Branch, namely the Presidency. The new Constitution will not be fully operational, without the Presidential office being duly filled, as provided by the Constitution and the ordinary law.

[227] But the Constitution not only represents a special and historic compact among *the people*; it expressly declares all powers of governance to emanate from

the people, and to be for service to the people. **Article 1 of the Constitution** thus provides:

**“(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”**

**“(2) The people may exercise their sovereign power directly or through their democratically elected representatives.”**

[228] What is now before the Court is a case in which the people, as makers and main beneficiaries of the Constitution, have employed the prescribed machinery, and cast their votes, in exercise of their political will to elect the leading member of the Executive Branch.

[229] What principle ought to guide this Court in its attempts to resolve the electoral question?

[230] Without as yet deciding the main question in the contest, we express the opinion that, in the special circumstances of this case, an insightful judicial approach is essential. There may be an unlimited number of ways in which such an approach is to guide the Court. But the fundamental one, in our opinion, is *fidelity to the terms of the Constitution*, and of such other law as objectively reflects the *intent and purpose of the Constitution*.”

59. I consider that although there is scope under the constitution for the court to develop the law, such power is to be exercised where it is called for in addressing new situations that may emerge on the doctrine that the law is always speaking. Where however as here the terms of the constitution are clear and unambiguous it only remains for the court to apply them to the situation established by the facts of the case.

**60. Scrutiny of votes in certain Polling stations.**

The scrutiny of the votes in the appointed polling stations revealed the following irregularities, as shown in the Deputy Registrar’s Report:

**HIGH COURT OF KENYA AT KISII**

**ELECTION PETITION NO. 5 OF 2013**

**REPORT ON RECOUNT AND SCRUTINY OF NYARIBARI CHACHE  
CONSTITUENCY**

*On 20<sup>th</sup> September 2013, the Honourable Election Court in the above matter granted an order for scrutiny and recount of the following polling stations:-*

1. *St Teresa Amasago Stream I*
2. *St Teresa Amasago Stream II*
3. *Kegati Stream I*
4. *Bobaracho Stream I*
5. *Gekomu Stream I*
6. *Gusii Stadium Stream I*

7. Gusii County Council Stream I
8. Gusii County Council Stream II
9. Gusii County Council Stream III
10. Otamba Primary Stream II
11. Kiogoro TBC Stream I
12. Kenyerere TBC

*The exercise was to be conducted under the supervision of the Deputy Registrar of the court and in the presence of one agent each for the Petitioners and the Respondents. A report was to be presented to the court on Tuesday 24<sup>th</sup> September, 2013 at 12.00 noon.*

*Upon directions being given on 20<sup>th</sup> September, 2013, the parties agreed that the exercise would commence on 21<sup>st</sup> September, 2013 at 8am. The agents for the parties were to be nominated and their names forwarded to the Deputy Registrar by the counsels for the parties.*

*The exercise of recount and scrutiny involved the opening of the ballot boxes for each of the stations in the presence of the parties. Each vote was counted. A form was filled in respect of each of the ballot boxes stating:*

1. *The number of votes cast*
2. *The number of spoiled ballot papers*
3. *The number of rejected votes*
4. *The number of rejected and objected votes*
5. *Total number of valid votes*
6. *The number of valid votes cast in favour of each candidate*

*Once filled the same was duly signed by an agent of each of the parties as a confirmation that the results shown above were a true and accurate count of the votes in the particular polling station. The forms for the recount of each polling station are also annexed to this report. The Green Book and the Polling Day Diary for each of the stations were then scrutinised.*

*After recounting Form 35, the unused ballot papers and counterfoils were then scrutinised. The findings were inserted into two other forms. The forms are duly annexed hereto.*

*The following is a summary of the findings of the scrutiny and recount of each of the mentioned stations*

**ST TERESA AMASAGO 032**

**STREAM 1**

***Recount findings***

<i>Total No of votes cast</i>	591
<i>No of spoiled ballot papers</i>	2
<i>No of rejected votes</i>	10
<i>No of disputed votes</i>	0
<i>No of rejected objected votes</i>	0
<i>Total no. of valid votes</i>	581
<i>Stray ballot</i>	1

<b>Name of Candidate</b>	<b>Number of valid votes cast</b>
1.ALFAYO OTUKE	0
2.BENSON MOGAKA	22
3.CHRIS BICHAGE	195
4.DAVID AYUBU	2
5.FRED ORORA	33
6.JAMES KENANI	84
7.MELCHIZEDECK ATIKA	5
8.MESHACK ONDARI	8
9.OGARI BERNARD	3
10.ONSERIO MISARO	5
11.RICHARD TONG'I	76
12.ROBERT MONDA	137
13.STEPHEN MASESE	0
14.THOMAS MOGAKA	0
15.ZAHEER JHANDA	11
<b>TOTAL</b>	<b>581</b>

***Scrutiny***

1. Form 35 –

i) There were no alterations noted

ii) The following changes were noted in the votes as recounted and those indicated in Form 35:-

a) Votes cast was indicated as 581. We got 582

b) Rejected votes indicated as 9. We got 10

c) Chris Bichage indicated as 196. We got 195

d) Onserio Misaro indicated as 4. We got 5

iii) 11 agents signed the Form

iv) The Presiding officer duly signed the Form and made his statutory comment. It is noted that the validation stamp was not affixed.

2. Unused Ballot papers and Counterfoils – The same tallied with number of votes cast

3. Condition of the box – All seals intact

4. Polling Day Diary and Green Book – No persons were listed in the Polling Day Diary as having voted even though their names did not appear in the manual register or the EVID.

**STREAM 2**

**Recount**

Total No of votes cast 574

No of spoiled ballot papers 0

No of rejected votes 1

No of disputed votes 0

No of rejected objected votes 0

Total no. of valid votes 573

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	3
2.BENSON MOGAKA	15
3.CHRIS BICHAGE	196
4.DAVID AYUBU	5

5.FRED ORORA	29
6.JAMES KENANI	110
7.MELCHIZEDECK ATIKA	9
8.MESHACK ONDARI	5
9.OGARI BERNARD	0
10.ONSERIO MISARO	3
11.RICHARD TONG'I	68
12.ROBERT MONDA	125
13.STEPHEN MASESE	0
14.THOMAS MOGAKA	0
15.ZAHEER JHANDA	5
<b>TOTAL</b>	<b>573</b>

**Scrutiny**

1. *Form 35 – Same not inside the ballot box and could therefore not be scrutinised. There was a Form 35 attached outside the ballot box*
2. *Unused Ballot papers and Counterfoils – The same did not tally with the number of votes cast. There were 14 unaccounted for ballot papers*
3. *Condition of the box – all seals intact*
4. *Polling Day Diary and Green Book – No persons were listed in the Polling Day Diary as having voted even though their names did not appear in the manual register or the EVID.*

**KEGATI STREAM I**

***Recount***

<i>Total No of votes cast</i>	<i>581</i>
<i>No of spoilt ballot papers</i>	<i>0</i>
<i>No of rejected votes</i>	<i>16</i>
<i>No of disputed votes</i>	<i>0</i>
<i>No of rejected objected votes</i>	<i>0</i>

Total no. of valid votes

565

Number of stray ballot

3

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	7
2.BENSON MOGAKA	23
3.CHRIS BICHAGE	291
4.DAVID AYUBU	3
5.FRED ORORA	10
6.JAMES KENANI	38
7.MELCHIZEDECK ATIKA	3
8.MESHACK ONDARI	8
9.OGARI BERNARD	2
10.ONSERIO MISARO	1
11.RICHARD TONG'I	37
12.ROBERT MONDA	130
13.STEPHEN MASESE	2
14.THOMAS MOGAKA	3
15.ZAHEER JHANDA	7
<b>TOTAL</b>	<b>565</b>

**Scrutiny**

1. Form 35 –

i) No alterations noted

ii) We noted the following differences in the votes we recounted and those indicated in the form:-

a) Melchizedeck Atika is indicated as having 4. We got 3.

b) Kengere indicated as 7. We got 8

c) Zaheer Jhandais indicated as 8. We got 7

iii) 3 agents signed the Form

iv) The Presiding officer duly signed but did not stamp the Form. No statutory comment was made

2. Unused Ballot papers and Counterfoils – The number of used counterfoils showed that 584 ballot papers were used. Only 581 votes were accounted for. This means that there are 3 unaccounted for ballot papers

3. Condition of the box – All seals were intact

4. Polling Day Diary and Green Book – On page 25 of the same the Presiding officer made the following comment “I allowed the following people to vote after they were identified with only one system, EVID or manual register”.

i) Sabina Kwamboka Sagero ID no XXXXXXXX – having perused the Green book the name was found under serial number 1306 at page 39

ii) Boniface Mabeya ID no XXXXXXXX – having perused the green book the name was found as Serial number 66 on page 2.

iii) Anna Gekonde Nyaboke ID no XXXXXXXX – Having perused the green book the name was found on page 13 serial number 436

iv) Boniface Okari ID no XXXXXXXX – Having perused the green book the name was found on page 13 as serial number 425

v) Joyce Kemunto Nyakwa ID No XXXXXXXX – Having perused the green book the name Joyce Kemunto Nyakwama was found on page 30 as serial number 1003.

vi) Brendine Omurwa Ombuna (no ID indicated in the Poll day diary) – Having perused the Green book at page 18 serial number 600 the name Brendine Omurwa Ombuna ID no XXXXXXXX was found

vii) Margaret Nyakerario Makori ID no XXXXXXXX – Having perused the Green book the name was found on page 1 as serial number 5

viii) Matthew Juma Nyangeso ID No XXXXXXXX – Having perused the Green book the name was found on page 12 as serial number 397

ix) Maria Moraa Nyaanga ID not provided in the polling day diary. – Having perused the Green book the name Maria Moraa Nyaanga ID no XXXXXXXX was found on page 20 as serial number 677

x) Philip Robinson Mainya ID No XXXXXXXX – the name was found in the Green book at page 12 as serial number 408

xi) Nasur Otundo Mahady ID no XXXXXXXX – The name was

found in the Green book at page 32 as serial number 1074.

xii) Lawrence Omwamba Mose ID No XXXXXXXXX – The name was found in the Green Book on page 3 as serial number 102

xiii) Meremo Mogoro Benjamin ID no XXXXXXXXX – The name Meremo Ogoro Benjamin ID number XXXXXXXXX was found in the Green book at page 23 as serial number 761

xiv) Mogaka Benard Moikoyo ID no XXXXXXXXX – the name was found in the Green book as serial number 1041 at page 31

**BOBARACHO PRIMARY SCHOOL STREAM I 006**

Total No of votes cast	532
No of spoiled ballot papers	1
No of rejected votes	9
No of disputed votes	0
No of rejected objected votes	0
Total no. of valid votes	523

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	5
2.BENSON MOGAKA	35
3.CHRIS BICHAGE	277
4.DAVID AYUBU	2
5.FRED ORORA	37
6.JAMES KENANI	27
7.MELCHIZEDECK ATIKA	2
8.MESHACK ONDARI	6
9.OGARI BERNARD	2
10.ONSERIO MISARO	1
11.RICHARD TONG'I	23
12.ROBERT MONDA	97
13.STEPHEN MASESE	3

14.THOMAS MOGAKA	1
15.ZAHEER JHANDA	5
<b>TOTAL</b>	<b>523</b>

**Scrutiny**

1. Form 35 –

i) There were no alterations noted

ii) The following changes were noted in the votes as recounted and those indicated in Form 35:-

a) Valid votes indicated as 525. We got 523

b) Chris Bichage indicated as 279. We got 277

c) Onserio Misaro indicated as 0. We got 1

c) Robert Monda indicated as 98. We got 97

iii) 5 agents signed the Form

iv) The Presiding officer duly signed and stamped the Form. No statutory comment was made

2. Unused Ballot papers and Counterfoils – Same tallied with the number of votes cast

3. Condition of the box – All seals were intact

4. Polling Day Diary and Green Book – the Presiding Officer commented on page 12 that there were some voters who could not be found in the manual register even though they were in EVID machine. While some were in the Register but not in the EVID.

The following observations were made when the Green book was perused

Those listed as not in register but EVID:-

a) Margaret Nyanchama Tinega ID No XXXXXXXXX – Name in Green Book at page 18 serial number 598

b) Sarah Moraa Matwere (no ID indicated) – The name Sarah Moraa Matwera ID No XXXXXXXXX found in Green Book at page 17 as serial number 569

c) Sellah Bosibori Nyangai – ID XXXXXXXXX – Name found in green book at page 13 as serial number 436

d) Job N Machogu – ID XXXXXXX – The name Job Nyakoni

*Machuga found on page 2 as serial number 55*

- e) *Martha Kwamboka Ontiri (no ID indicated) – The name Martha Kwamboka Ontiri found on page 26 as serial number 851*
- f) *Alfred Martin Magere – ID XXXXXXXXX – Name found on page 7 of the Green book as serial number 228*
- g) *Pacifica Mongina Nyabuto (no ID indicated) – The name Pacifica Mongina Nyabuto found on page 13 at serial number 421 of the Green Book*
- h) *Leah K Getwambu – ID XXXXXXXXX – the name is listed in the Bobaracho Secondary School side of the Green Book as serial number 3205 (158). It is noted that the list is pasted at the back of the green book*
- i) *Linet Kerubo Gwaro (no ID indicated) – The name Linet Kerubo Gwaro ID no XXXXXXXXX is listed in the Green book on page 7 as serial number 225*
- j) *Michael Kinyanjui Mwaura (no ID indicated) – The name Michael Kinyanjui Mwaura ID no XXXXXXXXX is found on page 9 of the Green book as serial number 284.*
- k) *Clemensia Oinga Mosima (no ID indicated) – The name is found as serial number 1021 in the Green book. It is noted that the name Nicholus Osoro Matini was deleted and the name Clemensia Oinga was inserted. The name Nicholus Osoro Matini is however found on the Bobaracho Secondary School list at page 90 as serial number 3030 (373) which shares a green book with Bobaracho Primary School*
- l) *Mose Okero Lawrence – ID XXXXXXXXX – The name is found in the Green book at page 12 as serial number 399*
- m) *William Nyabayo Maengwe – ID XXXXXXXXX – The name is found in the Green book as serial number 717 at page 22*
- n) *Maurice Nyakundi Momanyi – ID XXXXXXXXX – The name is found on page 15 as serial number 504*
- o) *Benson Mayore Manwa – ID XXXXXXXXX – The name is found in the Green book as serial number 843 at page 25*
- p) *Ogero Cleophas Mnarygsym – ID XXXXXXXXXX – The name is found on page 6 of the green book as serial number 199. It is noted that the number indicated in place of the ID is XXXXXXXXXX*
- q) *Teresa Kemunto Gekonge – ID XXXXXXXXX – the name is found on page 16 of the Green book as serial number 518*
- r) *Joseph Isaka Mokoro – ID no XXXXXXXXX – The name is found on page 13 as serial number 438*

- s) *Risper Bosibori Ongori – ID no XXXXXXXXX – The name is found in the green book as serial number 160 on page 5*
- t) *Justine Nyabengi Machogu – ID no XXXXXXXXX – The name is found in the green book on page 24 as serial number 791.*
- u) *Geoffrey Ombogo Nyang'au – ID XXXXXXXX – the name is found in the green book on page 14 as serial number 449*

*Those listed as in Register but not in EVID*

- a) *Patrick Onkunya Getereka – XXXXXXXX – The name is found in the green book as serial number 366 on page 11*
- b) *Mackson Machuki Ogega- ID No XXXXXXXXX – The name is found in the green book on page 32 as serial number 1055*
- c) *Onsare Nyagwachi Nathan – ID No XXXXXXXXX – The name is found in the green book on page 25 as serial number 833*
- d) *Tom Mogere Nyangau – ID No XXXXXXXXX – The name is found in the green book as serial number 813 at page 24*
- e) *Mary Nyaboke Orenge – ID No XXXXXXXXX – The name is found in the green book as serial number 291 at page 9*
- f) *Robinson Okero Onyari – ID No XXXXXXXXX – The name is found in the green book at page 15 as serial number 507*
- g) *Joseph Omuko Bosire –ID No XXXXXXXX – The name is found in the green book at page 32 as serial number 1085*
- h) *Denis Omboga Onduso – ID No XXXXXXXXX – The name is found in the green book as serial number 950 on page 28*
- i) *Ronald Bikeri Matini – ID No XXXXXXXX – The name is found in the green book at page 33 as serial number 1109*
- j) *Pacifica Moraa Omurwa – ID No XXXXXXXX – The name is found in the green book at page 28 as serial number 948*
- k) *Regina Kerubo Omwenga – ID no XXXXXXXX – The name is found in the green book as serial number 1083 at page 32. It is noted that the name Stellah Maroko ID No XXXXXXXX was cancelled on that particular serial number and that there are 2 signatures. The name Stellah Maroko ID no XXXXXXXX is found in the Bobaracho Secondary School list as serial number 3010 (421) which shares a green book with Bobaracho Primary*
- l) *Evans Gisicho Maikuri (In master Reg 12798452) – The name is found in the green book on page 17 as serial number 570*
- m) *Richard Moindi Mwamba – ID No XXXXXXXXX – The name is found on page 21 of the green book as serial number 709*
- n) *Nemwel Nyasani Omanwa – ID no XXXXXXXXX – The*

name is found in the green book at page 33 as serial number 1108

o) Darius Okari Ogega – ID no XXXXXXXXX – the name is found on page 23 of the Green book as serial number 766

p) Roseline Nyaboke Gisembe ID no XXXXXXXXX – The name is found in the green book at page 23 as serial number 755

p) Linus Mayieka Nyangaresi –ID No XXXXXXXXX – The name is indicated in the green book as serial number 816 at page 24

q) Omuko Frank Ogaro – ID No XXXXXXXXX – The name is found in the Green book at page 4 as serial number 124

**GEKOMU STREAM I 020**

Total No of votes cast	600
No of spoilt ballot papers	0
No of rejected votes	11
No of disputed votes	0
No of rejected objected votes	0
Total no. of valid votes	589
Number of Stray votes	1

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	2
2.BENSON MOGAKA	4
3.CHRIS BICHAGE	315
4.DAVID AYUBU	1
5.FRED ORORA	28
6.JAMES KENANI	66
7.MELCHIZEDECK ATIKA	6
8.MESHACK ONDARI	10
9.OGARI BERNARD	3
10.ONSERIO MISARO	3

11.RICHARD TONG'I	77
12.ROBERT MONDA	57
13.STEPHEN MASESE	0
14.THOMAS MOGAKA	3
15.ZAHEER JHANDA	14
<b>TOTAL</b>	<b>589</b>

1. Form 35 –

i) *There were no alterations noted*

ii) *The following changes were noted in the votes as recounted and those indicated in Form 35:-*

a) *Rejected votes indicated as 10. We got 11*

b) *Valid votes indicated as 590. We got 589*

iii) *No agent signed the form*

iv) *The Presiding officer duly signed and stamped the Form. No statutory comment was made*

2. *Unused Ballot papers and Counterfoils – The same tallied with the total number of votes cast.*

3. *Condition of the box – All seals intact.*

4. *Polling Day Diary and Green Book – the following names were listed on page 12 of the Polling Day Diary as “missing from register but after seeking clarification from Reg 1 they confirmed to us that she should be allowed to vote”*

a) *Lidya Monyenye Moraa ID no XXXXXXXX – Having perused the Green book the name Monyenye Moraa Lidya ID no XXXXXXXX was found as serial number 390 on page 12.*

b) *Florence Nyamosi Mataiga ID no XXXXXXXX – Having perused the Green book the name Florence Nyamosi Mataiga ID No XXXXXXXX is found on page 23 as serial number 11705995.*

*On page 25 the Presiding Officer commented that “names of voters were missing e.g Monyenye Stella Nyangara of ID No XXXXXXXX. We called Reg 1 and advised allow the voter to vote. Having perused the Green Book the name Monyenye Stella Nyangara ID no XXXXXXXX was found on page 14 serial number 466.*

**GUSII STADIUM STREAM 1 (025)**

<i>No of spoilt ballot papers</i>	0
<i>No of rejected votes</i>	6
<i>No of disputed votes</i>	0
<i>No of rejected objected votes</i>	0
<i>Total no. of valid votes</i>	497

<b>Name of Candidate</b>	<b>Number of valid votes cast</b>
1.ALFAYO OTUKE	4
2.BENSON MOGAKA	23
3.CHRIS BICHAGE	196
4.DAVID AYUBU	2
5.FRED ORORA	21
6.JAMES KENANI	38
7.MELCHIZEDECK ATIKA	5
8.MESHACK ONDARI	21
9.OGARI BERNARD	4
10.ONSERIO MISARO	4
11.RICHARD TONG'I	54
12.ROBERT MONDA	68
13.STEPHEN MASESE	2
14.THOMAS MOGAKA	3
15.ZAHEER JHANDA	52
<b>TOTAL</b>	<b>497</b>

1. *Form 35 – Same not found inside the ballot box*
2. *Unused Ballot papers and Counterfoils – The same tallied with the total number of votes cast.*
3. *Condition of the box – All seals intact*
4. *Polling Day Diary and Green Book – the following names were*

listed on page 12 of the Polling Day Diary as “ names referred from stream 2 whose names appear on EVID but lacked in the manual register:-

a) Flori Neema Onchaga ID XXXXXXXX – Having perused the Green Book the name Florine Neema Onchaga ID No XXXXXXXX was found on page 1 as serial number 30.

b) Jackline Moraa Musee ID no XXXXXXXX – Having perused the Green Book the name Jackline Moraa Masese ID no XXXXXXXX was found at page 32 as Serial number 1075.

c) Haron Ragira Otundo ID No XXXXXXXX – Having perused the Green book the name Haron Ragira Otundo ID no XXXXXXXX was found on page 12 as serial number 392.

d) Benard Aricha Nyang’au ID No XXXXXXXX – Having perused the Green book the name Benard Aricha Nyangau ID no XXXXXXXX was found as serial number 89 on page 3.

### **GUSII COUNTY COUNCIL 026**

#### **STREAM I**

Total No of votes cast	479
No of spoilt ballot papers	0
No of rejected votes	7
No of disputed votes	0
No of rejected objected votes	0
Total no. of valid votes	472

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	0
2.BENSON MOGAKA	17
3.CHRIS BICHAGE	187
4.DAVID AYUBU	2
5.FRED ORORA	12
6.JAMES KENANI	38
7.MELCHIZEDECK ATIKA	11
8.MESHACK ONDARI	8
9.OGARI BERNARD	2

10.ONSERIO MISARO	5
11.RICHARD TONG'I	42
12.ROBERT MONDA	86
13.STEPHEN MASESE	2
14.THOMAS MOGAKA	1
15.ZAHEER JHANDA	59
<b>TOTAL</b>	<b>472</b>

1. Form 35 –

i) *There were no alterations noted*

ii) *The following changes were noted in the votes as recounted and those indicated in Form 35:-*

a) *Rejected votes indicated as 6. We got 7*

b) *Richard Tongi indicated as 41. We got 42*

c) *Robert Monda indicated as 87. We got 86*

iii) *12 agents signed the Form*

iv) *The Presiding officer duly signed and stamped the Form. A statutory comment was made*

2. *Unused Ballot papers and Counterfoils – The same tallied with the total number of votes cast.*

3. *Condition of the box – One seal missing*

4. *Polling Day Diary and Green Book – No persons were listed in the Polling Day Diary as having voted even though their names did not appear in the manual register or the EVID.*

### **STREAM II**

*Total No of votes cast* 618

*No of spoiled ballot papers* 0

*No of rejected votes* 9

*No of disputed votes* 0

*No of rejected objected votes* 0

<b>Name of Candidate</b>	<b>Number of valid votes cast</b>
1.ALFAYO OTUKE	0
2.BENSON MOGAKA	29
3.CHRIS BICHAGE	240
4.DAVID AYUBU	5
5.FRED ORORA	24
6.JAMES KENANI	27
7.MELCHIZEDECK ATIKA	11
8.MESHACK ONDARI	19
9.OGARI BERNARD	1
10.ONSERIO MISARO	5
11.RICHARD TONG'I	56
12.ROBERT MONDA	125
13.STEPHEN MASESE	1
14.THOMAS MOGAKA	2
15.ZAHEER JHANDA	64
<b>TOTAL</b>	<b>609</b>

1. Form 35 –

i) *There were no alterations noted*

ii) *The following changes were noted in the votes as recounted and those indicated in Form 35:-*

a) *Total number of valid votes indicated as 602.  
We got 609*

b) *Chris Bichage indicated as 242. We got 240*

c) *Robert Monda indicated as 126. We got 125*

d) *Zaheer Jhanda indicated as 63. We got 64*

iii) 9 agent signed the Form

iv) The Presiding officer duly signed. The same was however not stamped No statutory comment made

2. Unused Ballot papers and Counterfoils – The same tallied with the total number of votes cast.

3. Condition of the box – All seals intact

4. Polling Day Diary and Green Book – No persons were listed in the Polling Day Diary as having voted even though their names did not appear in the manual register or the EVID.

**STREAM III**

Total No of votes cast	458
No of spoiled ballot papers	0
No of rejected votes	4
No of disputed votes	0
No of rejected objected votes	0
Total no. of valid votes	454

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	1
2.BENSON MOGAKA	20
3.CHRIS BICHAGE	178
4.DAVID AYUBU	4
5.FRED ORORA	16
6.JAMES KENANI	32
7.MELCHIZEDECK ATIKA	9
8.MESHACK ONDARI	17
9.OGARI BERNARD	3
10.ONSERIO MISARO	2
11.RICHARD TONG'I	41
12.ROBERT MONDA	86

13.STEPHEN MASESE	1
14.THOMAS MOGAKA	1
15.ZAHEER JHANDA	43
<b>TOTAL</b>	<b>454</b>

1. Form 35 –

i) *There were no alterations noted*

ii) *The following changes were noted in the votes as recounted and those indicated in Form 35:-*

a) *Total number of votes indicated as 457. We got 458.*

b) *Valid votes indicated as 453. We got 454*

iii) *1 agent signed the Form*

iv) *The Presiding officer duly signed stamped the Form and made his statutory comment*

2. *Unused Ballot papers and Counterfoils – The counterfoils for the used ballot papers were not in the ballot box. The unused booklets were not in the ballot box. The same could therefore not be scrutinised.*

3. *Condition of the box – All seals intact*

4. *Polling Day Diary and Green Book – The following were listed on page 25 as missing from the Register*

a) *Wairimu Margret ID No XXXXXXXXX – Having perused the Green Book the name Wairimu Margaret ID number XXXXXXXXX was found on page 33 as Serial Number 1116.*

b) *Sabastiano Ombati Mogere ID No XXXXXXXXX – Having perused the Green Book the name Sabastiano Ombati Mogere ID no XXXXXXXXX is noted on page 69 as Serial Number 2339. It is noted that the letter (M) was inserted in the name Ombati.*

c) *Samuel MageriaOchego ID No XXXXXXXXX – The name Samuel MageriaOchego ID No XXXXXXXXX is found on page 74 as serial number 2383 in the Green Book*

d) *Joseph Maranga Amenity ID No XXXXXXXXX – The name Joseph Maranga Amenity ID no XXXXXXXXX is noted on page 12 as serial number 394 in the Green Book when the same is perused.*

e) *Justus Otuke Machungo ID no XXXXXXXXX – Having perused the Green book the name Justus Otuke Machungo ID no*

XXXXXXXX is found on page 31 as serial number 1041

f) Douglas Masera Nyaanga ID no XXXXXXXX Having perused the Green Book the name Douglas Maseria Nyaanga ID Number XXXXXXXX is noted at page 71 Serial Number 2387.

g) Geoffrey Onteri Mengo ID no XXXXXXXX – Having perused the Green Book the name Geoffrey Mengo ID no XXXXXXXX is noted at page 60 as serial number 2039

h) Tom Ongwara Mangara ID no XXXXXXXX – Having perused the Green Book the name Tom Ongwara Mangare ID no XXXXXXXX was found at page 6 serial number 171.

**OTAMBA STREAM 2 (027)**

Total No of votes cast 364

No of spoilt ballot papers 0

No of rejected votes 1

No of disputed votes 0

No of rejected objected votes 0

Total no. of valid votes 363

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	0
2.BENSON MOGAKA	21
3.CHRIS BICHAGE	29
4.DAVID AYUBU	5
5.FRED ORORA	9
6.JAMES KENANI	15
7.MELCHIZEDECK ATIKA	1
8.MESHACK ONDARI	14
9.OGARI BERNARD	1
10.ONSERIO MISARO	0
11.RICHARD TONG'I	182
12.ROBERT MONDA	82

13.STEPHEN MASESE	1
14.THOMAS MOGAKA	1
15.ZAHEER JHANDA	2
<b>TOTAL</b>	<b>363</b>

1. Form 35 –

i) *There were no alterations noted*

ii) *The following changes were noted in the votes as recounted and those indicated in Form 35:-*

a) *Votes cast was indicated as 366. We got 364*

b) *Rejected votes indicated as 2. We got 1*

c) *Valid votes indicated as 364. We got 363*

d) *Fred Orora indicated as 8. We got 9*

e) *MeshackOndari indicated as 15. We got 14*

f) *Onserio indicated as 1. We got 0*

g) *Robert Monda indicated as 81. We got 82*

h) *Zaheer Jhanda indicated as 3. We got 2*

iii) *11 agents signed the Form*

iv) *The Presiding officer duly signed stamped the Form and made his statutory comment*

2. *Unused Ballot papers and Counterfoils – Same tallied with number of votes cast.*

3. *Condition of the box – All seals intact*

4. *Polling Day Diary and Green Book – The Presiding officer made the following comments on page 12 of the Polling Day Diary*

a) *Peter Nyamwaro Omote ID No XXXXXXXXX missing from EVID.*

*Having perused the Green Book the name Peter Nyamwaro Omote ID Number XXXXXXXXX was found on page 11 as serial number 355*

b) *Trusilah Moraa Ogaro ID number XXXXXXXX's name was missing from both the EVID machine and the voter register.*

Having perused the Green book the name Trusillah Moraa Ogato ID number XXXXXXXX was found on page 12 as Serial Number 395. The two different surnames are noted.

c) Rebecca Moraa Magoi ID No XXXXXXXX was missing from EVID but was in the voter register

Having scrutinised the Green Book the name Rebeccan Morann Magoi ID number XXXXXXXX was found at page 6 Serial Number 202. It is noted that the 2 ID numbers do not completely match with one number being different

**d) Tom Nyaribo Isaac ID No XXXXXXXX's name was missing from both EVID and voters register. Having scrutinised the Green Book the name could not be traced.**

e) Christopher O Sagero ID no XXXXXXXX was missing from both the EVID and the voters' register.

Having perused the Green Book the name Christopher Omanga Sagero ID Number XXXXXXXX was found at page 10 as Serial Number 320.

f) Mary N Nyabuto ID number XXXXXXXX was missing from EVID machine but found in the voters register. A further comment was made that she was allowed to vote however her picture was not in the EVID machine but her name was found in both the EVID and voters register.

Having perused the Green Book the name Mary Nyamoita Nyabuto ID number XXXXXXXX was found at page 5 as Serial Number 160

**KIOGORO TBC STREAM 1 (050)**

Total No of votes cast	378
No of spoilt ballot papers	0
No of rejected votes	8
No of disputed votes	0
No of rejected objected votes	0
Total no. of valid votes	370

Name of Candidate	Number of valid votes cast
1.ALFAYO OTUKE	2
2.BENSON MOGAKA	27
3.CHRIS BICHAGE	24

4.DAVID AYUBU	3
5.FRED ORORA	2
6.JAMES KENANI	19
7.MELCHIZEDECK ATIKA	1
8.MESHACK ONDARI	11
9.OGARI BERNARD	1
10.ONSERIO MISARO	1
11.RICHARD TONG'I	221
12.ROBERT MONDA	57
13.STEPHEN MASESE	0
14.THOMAS MOGAKA	0
15.ZAHEER JHANDA	1
<b>TOTAL</b>	<b>370</b>

1. Form 35 –

i) *There were no alterations noted*

ii) *The following changes were noted in the votes as recounted and those indicated in Form 35:-*

a) *Votes cast was indicated as 379. We got 378*

b) *Rejected votes indicated as 6. We got 8*

c) *Valid votes indicated as 373. We got 370*

d) *Richard Tongi indicated as 224. We got 221*

iii) *3 agents signed the Form*

iv) *The Presiding officer duly signed stamped the Form and made his statutory comment*

2. *Unused Ballot papers and Counterfoils – One ballot paper was not accounted for having taken into account the number of votes cast and the used counterfoils. The used counterfoils showed that 379 ballot papers were used. We found 378.*

3. *Condition of the box – All seals intact*

4. *Polling Day Diary and Green Book – No persons were listed in the Polling Day Diary as having voted even though their names did not appear in the manual register or the EVID.*

**KENYERERE TBC 063**

<i>Total No of votes cast</i>	341
<i>No of spoiled ballot papers</i>	2
<i>No of rejected votes</i>	0
<i>No of disputed votes</i>	0
<i>No of rejected objected votes</i>	0
<i>Total no. of valid votes</i>	341

<b>Name of Candidate</b>	<b>Number of valid votes cast</b>
1.ALFAYO OTUKE	8
2.BENSON MOGAKA	87
3.CHRIS BICHAGE	6
4.DAVID AYUBU	0
5.FRED ORORA	3
6.JAMES KENANI	101
7.MELCHIZEDECK ATIKA	2
8.MESHACK ONDARI	9
9.OGARI BERNARD	1
10.ONSERIO MISARO	2
11.RICHARD TONG'I	8
12.ROBERT MONDA	111
13.STEPHEN MASESE	1
14.THOMAS MOGAKA	1
15.ZAHEER JHANDA	1
<b>TOTAL</b>	<b>341</b>

1. *Form 35 –*
  - i) *No alterations noted on the form*
  - ii) *Votes recounted tallied with those recorded in Form 35*
  - iii) *25 agents signed the Form*
  - iv) *Presiding officer duly signed and stamped the form and made a statutory comment*
2. *Unused Ballot papers and Counterfoils – same tallied with the number of votes cast*
3. *Condition of the box – One of the seals of the ballot box was broken.*
4. *Polling day Diary and Green Book – The polling day diary at pg 12 had the following as the comments of the Presiding officer*
  - a) *Pauline Kemunto Nyabaro detected as Dominic Okello by EVID. Her name was however said to be in the register and she was therefore allowed to vote.*

*Having scrutinised the Green book the name Pauline Kemunto Nyabaro was found on page 4 as Serial Number 135 with the ID indicated as XXXXXXXX.*

*It is noted that in the Polling Day Diary her ID number was not indicated in the Presiding Officer’s comment*
  - b) *Zablon M Machoka’s name is said to have been found only in the Manual registers and was allowed to vote. His ID Number was however not indicated in the Presiding Officer’s comment.*

*Having perused the Green Book the name Zablon Magutu Machoka ID number XXXXXXXX was found at page 5 as Serial Number 140.*
  - c) *Tabitha K Nyakweba’s name is said to have been found in the manual register only and that she was allowed to vote. Her ID number was not indicated*

*Having perused the Green Book the name Tabitha Kemunto Nyakweba was found on page 1 as Serial Number 25*
  - d) *Omboga Mongare Stephen – it is indicated in the Polling diary that his name is found in the original register.*

*Having perused the Green Book the name Ombogo Mong’are Stephen ID No XXXXXXXX was found at Page 11 as Serial Number 355.*

## **CONCLUSION**

*The above were the findings in the recount and scrutiny of the ballot boxes and their corresponding Green books and Polling Day Diaries as ordered. Annexed to the report are the original forms filled in respect of each of the boxes which were duly signed by the agents nominated. Also attached are my notes on the scrutiny of the Green book and Polling Day diaries.*

*I wish to add that the changes in the figures indicated in Form 35 and those we got on our recount were majorly due to the differences in the standards agreed upon during the recount and the standards used at the Polling stations.*

*The report is hereby presented to the Honourable Court as required by the Ruling of 13<sup>th</sup> September 2013.*

*Dated and signed on this 24<sup>TH</sup> of SEPTEMBER 2013*

**DEPUTY REGISTRAR**

**HIGH COURT AT KISII**

**61.Lack of Unused ballot papers and used ballot paper counter-foils.**

The report noted -

**GUSII COUNTY COUNCIL 026 STREAM III-**

***Unused Ballot papers and Counterfoils – The counterfoils for the used ballot papers were not in the ballot box. The unused booklets were not in the ballot box. The same could therefore not be scrutinised.***

- 62.The majority in the Court of appeal decision in ***Magara v. Nyamweya*** held that the lack of counterfoils and missing ballot boxes rendered the election result to be unverifiable and therefore invalid. Githinji, JA in dissenting did not think that the irregularities were of such magnitude and pervasiveness as to affect the result. In my view it all depends on the circumstances of the case. In declining to interfere with the electoral decision of the voters in Election petition NO. 8 of 2013, ***Paul Gitenyi Mochorwa v. Timothy Bosire and 2 Ors***, I considered the wide margin of the 8000 votes between the winner and the runner up without any evidence that the irregularities could affect the outcome of the election despite the correction of transpositional errors identified.
- 63.It may be that the missing counterfoils were in the sealed envelope under regulation 73 of the Regulations. When during scrutiny they were established to be missing, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent should have moved the court an directions to produce the sealed envelope in the same way that the parties had approached the court for a possible order to open the presidential ballot boxes to retrieve the principle registers alleged to have been put there. Although the counsel for the petitioner at the time rejected the move to produce the registers on account of the period of time necessary for the exercise, there was no issue of production of the ballot counter-foils.
- 64.There are different accounts as to how the presiding officers may have dealt with the sealed tamperproof envelope: DW4 on cross examination by counsel for the petitioner observed an irregularity the failure to put in ballot rejected ballots. He said at p. 141 of the proceedings:

“*[Gusii stadium 025]*

*Rejected votes are not counted for any candidate. They remain rejected. The rejected votes are tied together and put in the ballot box. That is what the regulations require. I did not receive rejected ballots in respect to 025 Gusii stadium. I did not get any report whether the rejected votes were put in the ballot boxes, it would be an irregularity if they were not put in the ballot boxes.*

*The notes by the presiding officer indicates that the rejected votes were not placed in the ballot boxes. They were put in a tape proof envelope handed them to election officer at tallying centre. It was not me. The election offices were under my authority. I do not know who received. I do not remember receiving rejected ballot papers. I do not agree that this was a grave irregularities. I do not recall any other incidences where this happened.”*

*Again, at Nyaguta Polling station, at p.171 of proceedings DW4 noted that **“At p. 12 the presiding officer indicates we had sealed all ballot boxes when we realized we had inserted the respective unused ballot papers and counterfoils of the used ballot papers. We decided to put them inside the Governors ballot box.”***

- 65.Regulation 77 (1) (d) requires the rejection at the counting of all ballot papers found to be different from the number for the particular station as established form the Counter-foil. Without the counter foil and the court has no information as to when the counterfoil went missing it would be possible to determine which ballot papers in the box to reject and which to accept. The situation is not helped by the fact that agents may not be present at the counting as they are excused by Regulation 79(7). The question therefore is how to authenticate and verify the ballots contained the affected ballot box without the counter-foils. Although the counterfoils may have been in sealed envelopes deposited with the Returning Officer, the fact that they were not produced upon discovery that they were not in the box places the scrutiny exercise and therefore the court in a handicap that it is not possible to establish both the validity of the ballots and the accuracy of their count.
- 66.The questions before the court is whether (a) the irregularities established amount to substantial non-compliance with the election law in the constitution and the elections Act and (b) whether the proved irregularities affect the outcome of the election.
- 67.The singular effect of any the irregularities in this case listed below by itself and the effect of any of the irregularities in connexion with any other or the corporate effect of irregularities as a combination does not in my view amount to an election so badly conducted as contravene the principles of election law in constitution and the elections act:
  - a. The few correction and alterations in the forms 35, countersigned or not;
  - b. Computation errors in the valid votes for the candidates in Form 35;
  - c. The errors of transposition form 35 to form 36;
  - d. Computation errors in totalling up the figures for valid votes cast in Form 36 with a 1622 difference in accuracy;
  - e. The lack of accurate record of names and number of persons voting without their names appearing on the principal register and the EVID register but being confirmed to exist on the Green Book register;
  - f. Possible disenfranchisement of some voters whose names could not be traced in the registers at the polling stations and verification with the Returning Officer was not possible because of failure of telephone connections with the tallying centre; and
  - g. Lack of unused ballot papers and used counter-foils in the ballot boxes.
- 68.From the evidence, the polling exercise conducted by the 1<sup>st</sup> respondent in an impartial manner by secret ballot, otherwise went on well with high voter turnouts, there were no allegations of bribery, violence or intimidation of voters and according to the Poll Day diaries registered voters were accorded their constitutional right to vote under Article 38 of the Constitution. Despite the errors in the accuracy of the results, the same were few and - the high voter turnout shows that not many voters may have been disenfranchised – the irregularities did not expose a systematic violation of Article 86 of the constitution on voting process. It cannot be said that the entire election was a sham and contrary to the constitution and Elections Act.
- 69.However, in determining whether noted irregularities affected the result in the election, regard must be had of the margin of win of the declared candidate and the runner-up as against the votes affected by the irregularities. The petitioner asserts that the margin of difference in votes cast for the petitioner and the 3<sup>rd</sup> respondent is 145. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that the correct

figure after correction of the errors in computation and transposition of the votes from 35 to form 36 is 1021.

70. The scrutiny revealed the following:

- a. There was largely a consistency on the figures in the majority of the polling stations save for the minor differences which the Deputy registrar attributed to different standards between the scrutiny and the vote counting at the polling station. The Deputy Registrar noted that *“I wish to add that the changes in the figures indicated in Form 35 and those we got on our recount were majorly due to the differences in the standards agreed upon during the recount and the standards used at the Polling stations.”*
- b. The persons shown as having votes after confirmation with the Green book were in fact registered in the Green Book, except one who did not appear on all the register for whom it was not clear whether he voted.
- c. There were 15 unaccounted for ballots papers – 14 at Amasago stream II and 1 Kiogoro Polling station.
- d. There were three unaccounted for ballots at Kegati stream I which may be explained and counterweighted against 3 stray ballots found in the ballot box.
- e. There were missing unused booklets and used counterfoils at Gusii County Council III so scrutiny was not possible.
- f. There were non-stamped form 35s, although these could be compared with the actual finding on the votes inside the box and the Form 35 already before the court.

71. Although it is not clear as to where the unused ballot papers and counter foils would be placed after being [put in a tamper proof envelope under Regulation 73, it appears that the presiding officer must have been trained to put them into the ballot box because that is what the 11 out of 12 presiding officers in the station scrutinised did. There would have to be an explanation as for the one presiding officer who did not put his unused ballots and counterfoils for used ballots in the ballot box. This was not offered by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. As shown above, the sealed tamperproof envelope though required to be put into the ballot box at least by practice was dealt with in different ways by different presiding officers, with most putting them in the ballot box, some putting them in a sealed envelope and handing it over to the returning Officer and another putting it in any open box after forgetting to put it in the correct ballot box.

72. The court is therefore left in a situation where the 458 votes shown as having been cast in the station cannot be verified. The court cannot also tell where the 15 ballots shown as having been used at Amasago II and Kiogoro Polling stations were cast or whether 14 ballots in Amasago were the 14 rejected votes shown on the Form 35. The figures involved in the irregularity of missing unused ballots and used counterfoils at Gusii County Council stream III and Kiogoro is 473. This figure is more than thrice the original margin of 145 vote difference between the winning candidate and the runner up in the election, and almost half of the recalculated margin of 1021. Taking into consideration that the figure emanates from scrutiny of only 12 of the 111 polling stations in the constituency, it is considered that the figure would most likely affect the result of the election, had scrutiny been ordered for all the polling station. Moreover, there are the minor changes identified in the scrutiny for the votes cast for the individual candidates. Most significantly, is the effect of the possibility of disenfranchisement of voters who may not have appeared in the registers and not capable of confirmation with the Green Book on account lack of telephone connectivity and the possibility of voters whose name did not appear in the register and were allowed to vote after confirmation with the Returning officer but not recorded anywhere thereby making verification of the votes impossible.

73. Moreover, the fact that the 14 ballot papers unaccounted for in the Amasago II Polling station, the same station where it was proved to have been delivered to the Tallying centre in questionable circumstances does exemplify that the polling exercise at the station was not properly conducted as required by law putting into doubt the results from the station. Might it be that the 14 missing ballots were part of ballots stuffed into the boxes where the counterfoils were missing such as Gusii County Council stream III, and hence could not be traced? In the absence of any credible explanation, such possibilities linger and it cannot confidently be held that the result would not be affected especially in view of the relatively small margin of difference of votes between the winning candidate and the runner up. In these circumstances of such uncertainties, I am unable to uphold, as requested by counsel for the 3<sup>rd</sup> Respondent, the principle of ‘first past the post’ to

- maintain the 3<sup>rd</sup> Respondent as the winner of a ‘closely fought election’.
74. As noted in Petition No. 8 of 2013, citing Georges CJ in *Mbowe v. Eliufoo* [1967] EA 240 the meaning of the phrase “affected the result” is broader than merely bridging the gap between the two leading candidates, and the court will invalidate an election result if it leads to a change in the result unless the margin of difference is so big that despite a substantial reduction of the gap leaves the winning candidate still with a higher majority.
  75. In this case, whether the margin between the 3<sup>rd</sup> respondent and the petitioner is taken as 145 according to the Form 36 record as submitted by the petitioner or 1021 as recalculated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, gap will be substantially reduced by the errors established upon scrutiny by way of differences in the valid votes for different candidates and the invalidation of the votes from the station affected by lack of counterfoils thereby making the verification of the votes impossible.
  76. Under the third formulation of the principles by Lord Denning MR. in of *Morgan v. Simpson* that **“even if the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake as to polls and it did affect the result, then the election is vitiated”**, in other words that an election will be invalidated if the irregularities though trivial affects the result, I find that the election must be set aside.
  77. In making its determination under Article 105 of the Constitution, the electoral court is enjoined to give effect to the will of the electors under Article 38 of the Constitution. I consider that the corporate will of the people of Nyaribari Chache would understand that the constitution enjoins the electoral court, where their will is not verifiable because of the absence of vital documents of record, to take the safest way of re-establishing their will by repeat election. It is the lesser of the two evils, if the absence of the re-election is the continued representation without their consent by a member of National Assembly so declared in an unaccountable process as their ‘elected’ representative.
  78. Accordingly, I return a determination under Article 105 of the Constitution that the incumbent Member of the National Assembly for Nyaribari Chache, **DR. CHRIS BICHAGE**, was **NOT** validly elected at the General Election of the 4<sup>th</sup> March 2013. A certificate of the determination pursuant to section 86 of the Elections Act shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly forthwith.
  79. As the acts and omissions giving arise to the outcome of this petition were committed by the Independent Electoral and Boundaries Commission and its officers, the party and party costs of petition will be paid by the 1<sup>st</sup> Respondent to the petitioners and the 3<sup>rd</sup> Respondent and such costs to be agreed or taxed by the taxing master of the court to a maximum of Kenya Shillings Two Million (Ksh.2M).
  80. In accordance with Rule 38 of the Election (Parliamentary and County Elections) Petition Rules 2013, the security deposit paid into court by the petitioners will be released to the depositor forthwith.
  81. The court is grateful to counsel for the parties for their diligence in presenting their respective briefs in the petition and the Deputy Registrar of the Court, Ms. Lucy Kaitany, for her assistance in the scrutiny proceedings.

**Dated, signed and delivered on the 7<sup>th</sup> OCTOBER 2013.**

.....

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

**Mr. Momanyi - for the Petitioner**

**Mr. Magare - for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

**Mr. Orina** - for the 3<sup>rd</sup> Respondent

**Mr. Edwin Mongare** - Court Clerk